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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 42984-5-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In Re the Guardianship of Carolyn K. Plotke,
an incapacitated person,

YVONNE POLKOW, Guardian
Respondent

and

LEO K. PLOTKE,
Appellant

APPEAL FROM SUPERIOR COURT OF CLARK COUNTY
CAUSE NO. 08-4-00624-8

BRIEF OF RESPONDENT

THERÉSE A. GREENEN, WSB #22243
Attorneys for Respondent
GREENEN & GREENEN, PLLC
1104 Main Street, Suite 400
Vancouver, WA 98660
Telephone: (360) 694-1571

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I. ASSIGNMENT OF ERROR

- A. Appellant, Leo Plotke assigns error to the order issued by the trial court dated December 16, 2011 denying Mr. Plotke's motion for distribution of funds from the Plotke IOLTA account for personal and legal expenses.**

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Issues Related to Assignments of Error No. 1.**

Does the Memorandum of Agreement executed in July 2009 by the parties and confirmed by court order on January 29, 2010 authorize the distribution of funds from the Blocked Plotke IOLTA account for personal expenses incurred by Leo Plotke that are specifically unrelated to the special needs of Carolyn Plotke when the memorandum of agreement states all disbursements are intended solely for the special needs of Carolyn Plotke.

III. STATEMENT OF THE CASE

- A. Procedural History of the Case**

1. Carolyn Plotke (Carolyn), wife of Leo Plotke (Leo), was admitted to Legacy Emanuel Hospital at Salmon Creek in Vancouver, Washington on July 31, 2008 in grave condition suffering from advanced end-stage decubitus ulcers and associated medical complications. She was subsequently transferred to Legacy Emanuel Hospital's Burn Center in Portland, Oregon on August 3, 2008.

2. After a long hospitalization, Carolyn was eventually transferred to Fort Vancouver Convalescent Center in Vancouver, Washington where she remains at this time.

3. A guardianship of the person of Carolyn Plotke was established on August 6, 2008 and Yvonne Polkow, CPG was appointed in such capacity by Clark County Superior Court.

4. A guardianship of the estate of Carolyn Plotke was established on April 22, 2009 and Yvonne Polkow, CPG was appointed in such capacity by Clark County Superior Court.

5. A Memorandum of Agreement was executed by Leo Plotke, husband of Carolyn Plotke and Yvonne Polkow, guardian of Carolyn Plotke in July 2008 and filed with the court, which stated the agreed upon procedures the parties would take to ensure that financial support for Carolyn would be arranged by Leo by accessing funds from a reverse mortgage on the Plotke family home that was obtained for that purpose.

6. An order was entered January 29, 2010 approving the terms of the Memorandum of Agreement and setting the budget for specific agreed upon financial distributions that could be made using the reverse mortgage funds for the benefit of Carolyn Plotke's special needs. The order also required Leo to facilitate transfer of funds from a reverse

mortgage on the Plotke family home into the blocked Plotke IOLTA account established for the sole purpose of meeting such financial expenses incurred by Carolyn.

7. An order was entered December 3, 2010 directing Leo to request an additional \$82,000 from the reverse mortgage to fund the blocked IOLTA account after Leo failed to comply with the terms of the Memorandum of Agreement when he directed the reverse mortgage funds throughout 2010 for his own purposes rather than complying with the terms of the Memorandum of Agreement to support Carolyn financially.

8. On August 27, 2011, Leo filed a motion to access additional funds from the blocked IOLTA account to pay his own personal expenses unrelated to Carolyn's needs.

9. Following argument by counsel, an order was entered September 2, 2011 denying Leo's motion to access funds from the IOLTA account for expenses not agreed by the terms of the Memorandum of Agreement. (CP 206); (RP 27, L16 through RP 34, L10); and (RP38, L16 through RP 40, L17).

10. On October 27, 2011, Leo filed a second "renewed/amended" motion to access funds from the IOLTA Account. (CP 217)

11. On December 16, 2011, following argument by counsel, the court denied Leo's "renewed amended motion". (CP 225) (RP 52, L4 through RP 58, L8)

12. The December 16, 2011 court order denying Leo's "renewed amended motion" has been appealed by Leo.

B. Statement of facts

Respondent, Yvonne Polkow, has been the acting guardian of the person and estate of Carolyn Plotke since her appointment in 2008 (person) and 2009 (estate). (CP 120, Petition for Approval of Guardian's Accounting...) Carolyn has resided continuously at Fort Vancouver Convalescent Center following her discharge from the Legacy Emmanuel Burn Unit in Portland, Oregon in the late summer of 2008. Upon her admittance to Fort Vancouver Convalescent Center, Carolyn was largely paralyzed, bed ridden, insulin dependent, and suffering from severe decubitous ulcers that essentially left her with no flesh in major portions of her lower torso. (CP 120, Exhibit "C", Personal Care Plan) The advance decubitous ulcers and critical medical status were a result of the ongoing medical neglect of Carolyn by her husband, Leo and by their adult daughter, Kathleen Vanderpool as a result of their failure to provide adequate in-home care for Carolyn. (CP 120, Exhibit "C", Personal Care

Plan) and (CP 50, Report of Guardian ad Litem) Leo was subsequently charged with criminal neglect and his trial is pending.

In 2008, Carolyn and Leo owned their home in Yacolt, Washington valued at \$422,000.00. They each had an annuity, Leo's was valued at \$194,000.00 and Carolyn's was somewhat less. They also had \$18,000.00 in a Washington Mutual account. In the latter part of 2008 Leo, using his power of attorney for Carolyn, withdrew all the funds from Carolyn's annuity while she was hospitalized and used them to pay off the mortgage on their home. (CP 50, Report of Guardian ad Litem as to Financial Matters)

By 2009, Carolyn's ongoing care needs, legal costs and medical expenses were significant to the extent that it became necessary for the guardian and Leo to address the most favorable means of meeting the financial needs of both Carolyn, who was then residing at Fort Vancouver Convalescent Center and to also insure that Leo could continue to reside in the Plotke home. In addressing these issues, the court requested that Margaret Madison Phelan, WSBA No. 22659, attorney for Carolyn's Guardian ad Litem, Thomas Deutsch, look into Medicaid planning for Leo and Carolyn and to make a recommendation to the parties regarding Medicaid assistance and the best procedures to be followed. (CP 50)

On February 11, 2009, Ms. Phelan filed a Report of Guardian ad Litem as to financial matters (CP 50). Ms. Phelan is well experienced in the areas of Medicaid planning. Throughout the spring and summer of 2009, Ms. Phelan worked on organizing Leo and Carolyn's financial records and, in order to meet Medicaid requirements, worked diligently in meeting the standards necessary to qualify Carolyn for Medicaid and to also provide sufficient funds to cover the special needs of Carolyn. (CP 109, Order Allowing Transfers) In addition, Ms. Phelan worked to financially ensure that Leo could keep his own income rather than having to use it for Carolyn's care, and also to ensure that the Plotke home would not be jeopardized so that Leo could continue to reside there for as long as he was physically able. On June 19, 2009, Ms. Phelan filed her Summary of Medicaid Issues. (CP 87)

In order to comply with Medicaid, and with the consent of Leo and the guardian for Carolyn, Ms. Phelan revised Carolyn's estate planning, directed the purchase of a prepaid funeral plan for Carolyn, obtained fair market values of all Plotke major assets, assisted in transferring all jointly owned assets to the name of Leo individually as procedurally required by Medicaid and drafted correspondence to Leo and his attorney outlining the process. Ms. Phelan worked extensively on the preparation of the Memorandum of Agreement between the parties and made revisions

and/or additions as suggested by counsel for Leo and counsel for Carolyn's legal guardian. During this process, Ms. Phelan met with both parties and their legal counsel to review and discuss the Memorandum, communicated with the Genworth Reverse Mortgage Company chosen by Leo and his attorney, reviewed all Leo and Carolyn's financial accounts and bank statements and took any other steps necessary to ensure Carolyn was Medicaid eligible and the couple's assets protected.

When the Memorandum of Agreement was signed by all parties and filed with the court on July 15, 2009 (CP 97, Memorandum of Agreement) it was only after the parties had thoroughly reviewed the document, discussed it together and confirmed that they fully understood the terms of the agreement.

On August 20, 2009 Ms Phelan obtained an agreed order authorizing the transfer of property pursuant to the terms of the memorandum. (CP 109, Order Allowing Transfers)

On December 29, 2009, the guardian received the Medicaid award letter making Carolyn Medicaid eligible for financial assistance. At that time, a twelve (12) month period of time began running and, pursuant to Medicaid standards, there was a grace period until the end of 2010 (12 months) before all financial assets in excess of \$2,000 would have to be transferred from the Carolyn Plotke guardianship account into a blocked

IOLTA account to be used to cover Carolyn's expenses. Pursuant to the agreement of the parties in the Memorandum, during this initial twelve (12) month grace period, Leo agreed that he would request \$4,641.91 each month from the Genworth reverse mortgage he had obtained on the Plotke home and remit these funds to the guardian to be used for Carolyn's budgeted expenses for 2010. (CP 120, Exhibit "B", Petition for Approval of Guardian's Annual Accounting...)

On January 21, 2010, the guardian filed her first annual Petition for approval of the guardianship accounting, which defined the terms of the Memorandum of Agreement regarding Leo's support obligations and included the budget outlining the projected use of the \$4,641.91 monthly funds from the reverse mortgage. (CP 120, Exhibit "B", Petition for Approval of Guardian's Accounting...) The budget defined the specific expenses that would be paid from the reverse mortgage funds deposited into the IOLTA Account on a regular basis as follows:

- 1) Guardianship services for Carolyn
- 2) Medications for Carolyn
- 3) Medical expenses for Carolyn
- 4) Legal fees for guardian
- 5) Hair and other personal expenses for Carolyn
- 6) Fort Vancouver Care Center costs

7) Miscellaneous expenses incurred by Carolyn

On January 29, 2010, the court entered an order approving the guardian's accounting and the proposed budget and approving the terms of the Memorandum of Agreement which clearly stated Leo's financial obligations. (CP125, Order Approving Guardian's Annual Accounting and Personal Status Report)

In September 2010, counsel for the guardian, in preparation for establishing the blocked IOLTA account that was to be funded after the twelve (12) month grace period, was informed that Leo had failed to direct any funds from the Genworth reverse mortgage to the guardianship account as previously agreed for Carolyn's care over the past nine months and the guardianship estate was close to depletion.

Counsel for the guardian then filed a motion requesting Leo's financial records for 2010 which were ordered by the court. Leo's financial records from December 2009 to the present revealed that Leo had requested and received substantial funds from the reverse mortgage that had been established solely for Carolyn's special needs, and, rather than providing any of these funds to the guardianship as agreed to by the parties and ordered by the court, Leo spent the money for his own expenses and pleasures. As a result of the unauthorized withdrawals, the

remaining balance on the Plotke reverse mortgage line of credit had been depleted by over \$100,000 as of October 1, 2010.

On November 5, 2010 Ms. Phelan, attorney for former guardian ad litem filed her affidavit regarding Leo's involvement and knowledge of the Medicaid application stating that it was her belief that Leo entered into the contract with complete knowledge of the provisions. (CP 266, Affidavit of Margaret Phelan)

Given the history of Leo's ten (10) month ongoing noncompliance with the January 29, 2010 court order, and Leo's apparent and/or refusal to provide money to Carolyn for her care following the establishment of the guardianship, the guardian became extremely concerned that Leo would ultimately remove all of the funds from the reverse mortgage thereby leaving no financial support available for Carolyn's special, medical and personal needs. The court initially gave Leo an opportunity to voluntarily pay the guardianship financial deficiency then owing (\$82,100.00) but he refused to do so resulting in his civil contempt incarceration. On December 3, 2010 the court entered an order directing Leo to obtain from Genworth Financial the sum of \$82,100.00, representing the current deficiency owed to the guardianship, with such funds to be placed in the IOLTA account as provided in the Memorandum of Agreement. The court further ordered that Mr. Plotke direct Genworth Financial to deposit

the sum of \$4,641.91 directly into the same IOLTA account on a monthly basis beginning January 1, 2011. In the same order, the Court further restrained Mr. Plotke from removing any other funds from the Genworth Reverse Mortgage without approval of the court. (CP 177, Order Re: Reverse Mortgage, Genworth Financial)

On August 27, 2011, Leo filed a motion and declaration re: IOLTA Account requesting additional funds from the blocked IOLTA account to pay his own personal expenses unrelated to Carolyn's special needs. (CP 202A, Motion and Declaration Re: IOLTA Account)

On September 2, 2011 the guardian filed her response to Leo's motion for funds requesting that the motion be denied. (CP 205, Response to Motion Re: IOLTA Account)

On September 2, 2011 an order was entered denying Leo's motion to access funds from the IOLTA account for expenses not approved by the terms of the Memorandum of Agreement with the exception that IOLTA funds could be accessed to pay real property taxes on the Plotke residence because the home was subject to the reverse mortgage and property taxes were required to be kept current. This particular disbursement had been agreed upon by the parties. (CP 206, Order Re: IOLTA); (RP 32, L24 through RP 33, L4); and (RP 38, L17 through RP 40, L2)

On October 27, 2011, Leo filed a second motion to access fund from the IOLTA Account again requesting funds for his personal expenses even though this motion was previously denied on September 2, 2011. Leo identified his motion as a “renewed amended motion”. (CP 217, Renewed/Amended Motion Re: IOLTA Account)

On December 16, 2011, the Guardian filed and argued her response to the renewed/amended motion again requesting that the motion be denied. (CP 224, Response to Renewed/Amended Motion and Declaration Re: IOLTA Account) and (RP 52, L3 through RP 54, L8)

On December 16, 2011, the court denied Leo’s “renewed amended motion” requesting IOLTA disbursements previously denied on September 2, 2011 and also denied Leo’s request for additional legal fees from the IOLTA account. (CP 225, Order Denying Renewed/Amended Motion Re: IOLTA Account) (RP 55, L3-25)

The December 16, 2011 court order denying Leo’s “renewed amended motion” has been appealed by Leo.

IV. ARGUMENT

A. Standard of Review

This matter was tried to the court thus making the court the trier of fact. On appeal from a bench trial, conclusions of law are reviewed de

novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Hegwine v. Longview Fibre Co.*, 132 Wash.App. 546, 555, 132 P.3d 789 (2006). “Substantial evidence is evidence ‘in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.’” *J.E. Dunn Nw. Inc. v. Dep’t of Labor & Indus.*, 139 Wash.App. 35, 43, 156 P.3d 250 (2007) (quoting *Holland v. Boeing Co.*, 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978)). If the evidence satisfies this standard, the appellate court will not substitute its judgment for that of the trial court, even though it might have resolved the factual dispute differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879-80, 73 P.3d 369 (2003)

An appellate court defers to the trier of fact’s resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

B. Respondent Leo Plotke is not entitled to access funds to pay for his personal expenses from the blocked IOLTA account that was established pursuant to the Memorandum of Agreement for the exclusive purpose of providing for the special needs of Carolyn Plotke.

A contract is generally defined as a promise or a set of promises wherein the breach of which the law provides a remedy or the performance of which the law recognizes as a duty. *St. John Medical Center v. State ex rel. Department of Social and Health Services*, 110 Wash.App. 51, 38 P.3d 383 (Div. 2 2002). A contract requires offer acceptance and consideration. *Id.* A contract claim is actionable if the contract imposes a duty, that duty is breached and breach proximately causes damage to claimant. *Myers v. State*, 152 Wash. App. 823, 218 P.3d 241 (Div. 3 2009).

Washington has recognized all types of agreements as contracts including plea agreements (*State v. Chambers*, 256 P.3d 11283 (Wash Ct. App. Div. 2 2011)); collective bargaining (*Kitsap County Sheriffs Gild v. Kitsap County*, 148 Wash. App. 907, 201 P.3d 396 (Div. 2 2009)); and settlements (*Evans & Son, Inc. v. City of Yakima*, 136 Wash. App. 471, 149 P.3d 391 (Div. 3 2006))

Washington follows objective theory of contracts which focuses on objective manifestations of agreement rather than less precise subjective intent. Washington law focuses on the outward manifestation of assent made to the other party. *City of Everett v. Sumstand's Estate*, 95 Wash. 2d 853, 631 P.2d 366 (1981). Mutual assent is the current expression for “meeting of the minds” *Wetherbee v. Gary*, 62 Wash. 2d 123, 381 P.2d

237 (1963). It must be based on objective manifestation of mutual intent on the essential terms of the promise, that is the party will be held to what a reasonable person in position of other party would conclude his/her manifestation to mean. *Id.*

Since the focus is on objective manifestations, WA law permits introduction of evidence concerning circumstances surrounding the agreement pursuant to *Berg v. Hudesman*, 801 P.2d 222, 115 Wn.2d 657 (1990) and *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wash.App. 389, 245 P.3d 779 (Div. 1 2011).

However, *Hollis v. Garwell, Inc.* narrowed *Berg* in that there are times when the court cannot use extrinsic evidence. (1) to show a party's unilateral intent as to meaning of a Contract word or term (2) to show an intention independent of the instrument or (3) to vary , contradict or modify the written word. *Hollis v. Garwell, Inc.*, 974 P.2d 836, 137 Wn.2d 683 (Wash. 1999). Extrinsic Evidence is to be used to illuminate what was written, not what was intended to be written. *Id.* Now, the court will not receive parol evidence on theory that it would clarify an ambiguity if the contract is not ambiguous in the first place. *Spratt v. Crusander Insurance Co.*, 109 Wash. App. 944, 37 P.3d 1269 (Div. 3 2002) or if it is

irrelevant because it would not change the ultimate result. *Go2Net, Inc. v. CI Host, Inc.*, 115 Wash.App. 73 60 P.3d 1245 (Div. 1 2003).

The parties, Yvonne Polkow, court appointed certified professional guardian for Carolyn, individually and by and through her attorney, THERÉSE A. GREENEN, and Leo, husband of Carolyn, individually and by and through his attorney, DEE GRUBBS, by mutual agreement executed a contract identified as a Memorandum of Agreement in July 2009, which was filed with the court on July 15, 2009 and affirmed by court order on January 29, 2010 in Clark County Superior Court. (CP 97, Memorandum of Agreement and CP125, Order Approving Guardian's Accounting and Personal Status Report). The intent of the parties was to enter into a contract to provide financial support for the ongoing special needs of Carolyn Plotke. (CP 97, Memorandum of Agreement). There is no provision in the contract providing for Leo to receive IOLTA funds for any purpose prior to Carolyn's death.

Prior to signing the contract, the parties consulted with and were advised by Margaret Phelan, Attorney at Law, of the terms and financial requirements that must be adhered to in order for Carolyn to qualify for Medicaid. All parties including Leo and his counsel participated with complete understanding and were aware of the terms. (CP 266, Affidavit of Margaret Phelan)

The touchstone of contract interpretation is the parties' intention, which we attempt to determine by focusing on the agreement's objective manifestations, *Dave Johnson Ins. V. Wright*, 167 Wn. App. 758 (2012), citing *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 783, 211 P.3d 448 (2009), 168 Wn.2d 1026 (2010).

The contract signed by the parties in June 2009 clearly stated the obligations and duties of the parties, was signed only after consultation with legal counsel and a determination was made that a meeting of the mind was present. Leo agreed to apply for a reverse mortgage, consented that the funds shall be used for the special needs of Carolyn and complied with attorney Margaret Phelan's request to have Carolyn declared Medicaid eligible. However, once the funds became available, Leo violated Page 8, Section (d) of the Memorandum of Agreement (CP 97) contract continuously throughout 2010 when he failed to provide the guardian for Carolyn Plotke with any of the funds that he took from the Genworth reverse mortgage from December 2009 through October 2010, thereby incurring a debt owing to Carolyn's guardianship in the amount of \$82,100.00.

At a hearing held on December 3, 2010, the court entered an order that directed Leo Plotke to obtain additional funds from the Genworth reverse mortgage in an amount equal to the monies owing (\$82,100.00) which he had previously failed to provide and also to direct future monthly allotments of \$4,641.00 to the same IOLTA account. (CP177, Order Re:

Reverse Mortgage, Genworth Financial) This order was upheld by the Court of Appeals in August 2012 in its unpublished opinion under Cause No. 41537-2 II (a separate appeal filed by Leo Plotke in the matter of the guardianship of his wife Carolyn Plotke).

Notwithstanding the Memorandum of Agreement between the parties that the IOLTA account was to pay for Carolyn's special needs, Leo filed a motion on August 31, 2011 (CP 2020A, Motion/Declaration Re: IOLTA Account) to access funds from the blocked IOLTA account to pay some debts he had personally incurred:

1. \$5,000 for legal fees owed to appellate attorney Christopher Hardman.
2. \$7,633.88 for delinquent due property taxes on the Plotke home in which Mr. Plotke is residing.
3. Funds to maintain the septic tank and to repair the hot water heater in the Plotke home which was occupied by Leo and also by the Plotke's adult daughter Kathleen.

By agreement of the parties that the reverse mortgage required all property taxes to be current, the request to pay the past due property taxes was granted. (RP 38, L17 through RP 40, L17) Leo's remaining requests for legal fees, and repairs and maintenance were denied by the court on September 2, 2011 by Order Re: IOLTA (CP 206).

On October 27, 2011 Leo filed another motion again requesting that these same expenses be paid from the IOLTA account (CP 217, Renewed/Amended Motion Re: IOLTA). This motion was subsequently denied by the court on December 16, 2011. (CP 225, Order Denying Renewed/Amended Motion Re: IOLTA) The October 27, 2011 motion was identified by Leo as a “renewed and amended motion” that requested the same expenditures to be paid from the IOLTA account that had been requested in the August 27, 2011 motion previously denied by the court on September 2, 2011. The only change in this “amended” motion was a request for an additional \$5,000 for attorney’s fees. (RP 52, L4 through RP 54, L8)

In denying the Renewed/Amended Motion Re: IOLTA Account (CP 225), the court advised Leo that, by initially not taking care of his wife by failing to provide financial support throughout 2010, he was now responsible for his own costs and fees incurred as a result of his own actions. (RP 55, L1-25)

The order denying the “renewed amended motion” on December 16, 2011 upheld the terms of the Memorandum of Agreement (CP 97) wherein the parties agreed that the special needs of Carolyn will continue and that Leo shall continue to be responsible for such needs. The agreement further states, that at such time that Carolyn no longer has

special medical or financial needs (through recovery or death), any remaining funds in the IOLTA account would then revert to Leo Plotke. (CP 97, Memorandum of Agreement)

The Memorandum of Agreement specifically states that by Leo directing the monthly reverse mortgage funds to the IOLTA account for Carolyn's special needs, Leo benefits because such actions discharge his obligation to provide any additional financial assistance to Carolyn. (CP 97, Page 10, L4-6 of the Memorandum of Agreement)

The plain language in the contract specifically states the manner in which the Genworth reverse mortgage funds are transferred into the IOLTA account, how the funds are to be spent and how this satisfies Leo's financial obligations for Carolyn's support.

.... "[W]e 'impute an intention corresponding to the reasonable meaning of the words used,' and 'give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent'" citing *Oliver*, 137 Wn.App. at 659.

Dave Johnson Ins. v. Wright, 167 Wn.App. 758 (2012) citing *Oliver v. Flow International Corp.*, 137 Wn.App. 655, 155 P.3d 140 (2006).

A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable

grounds or reasons. *State v. Berty*, 136 Wash.App. 74, 83-84, 147 P.3d 1004.

Based upon the terms of the Memorandum of Agreement and consent of both parties, the court by upholding the terms of the Memorandum of Agreement did not abuse its discretion and did not err in denying Leo access to funds from the IOLTA account for his personal needs.

It is noted that the December 3, 2010 court order does not restrain Leo from accessing the equity line of credit for any other purpose besides for deposit of funds into the IOLTA account. Mr. Plotke misstates the restrictions of this order. (CP 177, Order Re: Reverse Mortgage, Genworth Financial) The order clearly states that Mr. Plotke is prohibited from making further withdrawals from the reverse mortgage without further court approval. It does not prohibit him and, in fact, counsel for the guardian has twice encouraged counsel for Leo to Petition the court for the necessary funds after Leo failed to pay the 2011 property taxes because Leo was jeopardizing Carolyn's future financial support.

Leo states that the guardian's counsel is in possession of his funds that are currently in the IOLTA account at West Coast Bank and that the guardian refuses to return them to him or pay his urgent expenses. He provides evidence of all the demands he has made since March 2011 all of

which counsel for the guardian has addressed. (CP 205, Response to Motion Re: IOLTA) Pursuant to the Agreement, the IOLTA Funds are solely for Carolyn's special care needs. (CP 97, Memorandum of Agreement) Medicaid rules require that the funds be identified under the name of Leo in order for Carolyn to be Medicaid eligible and that there be a provision for any funds remaining after Carolyn passes away to be distributed to Leo following payment of all debts incurred by Carolyn. In other words, he is a contingent beneficiary of this account but is not currently entitled to the use of the funds for his own needs. If the IOLTA funds were distributed to Leo, as he maintains they should be, Carolyn would immediately become Medicaid ineligible (RP 54, L11 through RP 55, L1) thereby costing Carolyn more than five thousand dollars a month in care costs alone and all the time, work and effort put forth by Ms. Phelan and others during 2009 to protect Carolyn and Leo would be meaningless and the reverse mortgage funds would be depleted in a matter of months. WAC 388-513-1350 and RCW 74.09.035, which state as follows:

WAC 388-513-1350: Defining the resource standard and determining resource eligibility for long-term care (LTC) services.

The Washington Administrative Code identifies how the department defines the resource standard and countable or excluded

resources when determining a client's eligibility for LTC services. The department uses the term "resource standard" to describe the maximum amount of resources a client can have and still be resource eligible for program benefits.

1. The resource standard used to determine eligibility for LTC services equals:

a. Two thousand dollars for:

i. A single client; or

ii. A legally married client with a community spouse, subject to the provisions described in subsections (5) through (11) of this section; or

b. Three thousand dollars for a legally married couple, unless subsection (3) of this section applies. ...

... 3. When both spouses are institutionalized, the department will determine the eligibility of each spouse as a single client the month following the month of separation. ...

... 5. When a single institutionalized individual married, the department will redetermine eligibility applying the rules for a legally married couple.

As a married couple, Carolyn and Leo must strictly adhere to the requirements as to limitations on available resources as long as Carolyn remains Medicaid eligible.

RCW 74.09.035: Medical care services – Eligibility, standards – Limits.

(1) To the extent of available funds, medical care may be provided to...

(a) Persons who:

(i) Are incapacitated from gainful employment by reason of bodily or mental infirmity that will likely continue for a minimum of ninety days as determined by the department. ...

(6) Residents of skilled nursing homes, intermediate care facilities, and intermediate care facilities for persons with intellectual disabilities, as that term is described by federal law, who are eligible for medical care services shall be provided medical services to the same extent as provided to those persons eligible under the medical assistance program. ...

C. Washington procedural rules prohibit Respondent, Leo Plotke from bringing a second motion before the court regarding matters previously denied.

Following entry of the Order Re: IOLTA on September 2, 2011 (CP 206), denying Leo's August 31, 2011 Motion Re IOLTA Account (CP 202A). Leo Plotke failed to file a motion to reconsider the order pursuant to CR 59, (8)(b).

Rule CR 59, New Trial, Reconsideration, and Amendment of Judgments, (8) (b) states as follows:

(8) ... (b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

In addition, Leo failed to file a notice of appeal of the September 2, 2011 Order Re: IOLTA (CP 206) within the allowed time for appealing a Superior Court order pursuant to RAP 5.2 9 (a) and (b).

RAP 5.2 Time Allowed to File Notice, (a) state as follows:

(a) Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

Finally, Leo failed to file any Notice of Discretionary Review of the September 2, 2011 order within the time allowed for requesting discretionary review. RAP 5.2 (b)

RAP 5.2 Time Allowed to File Notice, (b) state as follows:

...(b) Notice for Discretionary Review. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice for discretionary review must be filed in the trial court within the longer of (1) 30 days after the act of the trial court that the party filing the notice wants reviewed or (2) 30 days after entry of an order deciding a timely motion for reconsideration of that act under CR 59.

Instead, Leo once again requested IOLTA funds to pay for the same type of expenses he had previously incurred and the court had previously denied. (CP 217, Renewed/Amended Motion Re: IOLTA Account). On December 16, 2011, the court entered an order denying for a second time the use of IOLTA Funds for Leo's expenses (CP 225, Order Denying Renewed/Amended Motion Re: IOLTA). Based upon the

court's order of December 16, 2011, and Leo's to file a Notice for Discretionary Review, the order should be upheld as argued in the Guardian's December 16, 2011 response to Leo's motion. (CP 224, Response to Renewed/Amended Motion and Declaration Re: IOLTA Account)

V. REQUEST FOR ATTORNEY'S FEES

The guardian asks the appellate court to award the Guardianship of Carolyn Plotke attorneys fees and costs incurred by the guardian in defending against this matter at the appellate level pursuant to RAP 18.1.

Leo Plotke appealed the December 16, 2011 Superior Court order denying Mr. Plotke's motion for distribution of funds from the blocked IOLTA account. Leo Plotke's "renewed amended motion" was not brought in good faith because he knew the court had previously denied his request for funds on September 2, 2011 (CP 225) and (RP 38, L17 through RP 40, L17)

Attorney's fees incurred by the guardianship of Carolyn Plotke for responding to this appeal of the trial court's December 16, 2011 order denying funds should be awarded to Respondent based upon the filing of a frivolous motion that is without basis or legal merit.

VI. CONCLUSION

The court did not commit error when it denied Leo's "renewed/amended" motion for distribution of funds from the IOLTA Account on December 16, 2011 (CP 225, Order Denying Renewed/Amended Motion Re: IOLTA). The funds requested were not for the benefit of Carolyn's special needs as agreed to by the parties in the Memorandum of Agreement. (CP 97) By denying Leo's motion on December 16, 2011 the court upheld the terms of the agreement. In addition the court did not error when it denied Leo's "renewed/amended" motion for distribution of funds on 2011 because the matter had already been addressed by court order on September 2, 2011.

Based upon the facts as presented and the argument herein, the trial court's order denying Leo Plotke's renewed motion for funds from the blocked IOLTA account should be upheld and Respondent should be awarded attorney fees and costs both in responding to this appeal and in responding in the trial court to the renewed motion and hearing on December 16, 2011 pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 29th day of August, 2012.



THERESE A. GREENEN, WSB #22243
of Attorneys for Respondent

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the 29th day of August, 2012, I served a copy of the Brief of Respondent to the following person(s):

Dee Ellen Grubbs
Attorney at Law
5502 NE 44th Street
Vancouver, WA 98661

by mailing a correct copy thereof to Dee Ellen Grubbs, attorney for Appellant, certified by me a such, contained in a sealed envelope, with postage paid, addressed to said attorney at her regular office address as noted above and deposited in the post office at Vancouver, Washington. Between said post office and the addresses to which said copies were mailed, there is a regular communication by US. Mail.


KAREN M. MANKER